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In The
Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner

v.

JAMES ODOM ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, must be an organization with an ascertainable structure separate and apart from that inherent in the alleged pattern of racketeering activity.

2. Whether a group of corporations can constitute an association-in-fact RICO enterprise.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America respectfully submits this brief as *amicus curiae* in support of the petition for a writ of *certiorari*.[1]

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses, representing an underlying membership of more than three million businesses and professional organizations of every size and in every sector and geographic region in the country. One important function of the Chamber is to represent the interests of its members by filing briefs as *amicus curiae* in cases involving issues of national concern to American business.

The Chamber recognizes the importance of consistent and disciplined application of the Racketeer Influenced and Corrupt Organizations Act (RICO) to deter and remedy wrongdoing prohibited by the statute. At the same time, it is concerned about those who have strong incentives to misuse the statute against legitimate businesses, in large part because of civil RICO's treble damages provisions.

The court of appeals' holding in this case, that plaintiffs adequately pleaded a RICO association-in-fact "enterprise" consisting of two corporations engaged in no more than a marketing agreement, threatens RICO litigation for every business collaboration in which the

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[1] Letters from petitioners and respondents providing written consent to the filing of this brief are being filed with the Clerk of this Court along with this brief, in accordance with Rule 37.3. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

Chamber's members engage. Such business collaborations, ranging from a single contract to more elaborate alliances, are essential for many American businesses to compete effectively, expand into new markets, make costly investments, and engage in innovation.

The court of appeals' ruling allows plaintiffs to transform run-of-the-mill civil actions into RICO actions for treble damages against businesses who engage in lawful collaborations, without any requirement that the plaintiffs plead and prove that the putative RICO "enterprise" has an ascertainable structure separate and apart from that inherent in the activity alleged to constitute racketeering. The ruling below thereby threatens to convert a statute designed to deter organized crime into a tool primarily used to extract settlements from legitimate businesses. That is so because businesses cannot afford either the risk that litigation will result in an award of treble damages or the injury to their reputation due to press or industry accounts of the pendency of a federal court action against them under the federal racketeering statute. Indeed, the Chamber submits, and the plain language of the RICO statute demonstrates, that the "enterprise" element that is required to make a RICO case under Section 1962(c) for treble damages can never be met based merely on a group of two or more corporations that do not form a separate legal entity.

Accordingly, the Chamber and its members have a strong interest in the Court correctly interpreting RICO and reversing the decision below with regard to the federal RICO claims.

SUMMARY OF ARGUMENT

The Racketeer Influenced and Corrupt Organizations Act (RICO) authorizes a treble damages award against a person who operates an "enterprise" through a pattern of racketeering, 18 U.S.C. § 1962(c), or conspires to do the same, 18 U.S.C. § 1962(d). RICO defines "enterprise" for this purpose as "any individual, partnership, corporation, association, or other legal entity, and any union or group of

individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This case presents the questions whether a plaintiff bringing such a suit must establish an "enterprise" that is separate and apart from the conduct that constitutes the purported racketeering, itself, and whether a group of corporations may, without forming a separate legal entity, constitute an "enterprise" within the meaning of RICO.

The facts alleged describe petitioners Microsoft Corporation and Best Buy Stores, L.P., as having entered into a joint marketing contract to offer and activate trial membership of Microsoft's internet access service in Best Buy's stores. This is an unremarkable type of business collaboration that occurs in a similar manner countless times annually among businesses of all sizes and types across the country. RICO does not extend without limit to such circumstances, which are well beyond its target of stopping the corruption of legitimate businesses by organized crime.

But, according to plaintiffs, this marketing arrangement and activities in furtherance of the arrangement, alone, constitute an "enterprise" that gives rise to potential liability under 18 U.S.C. § 1962(c) for RICO treble damages and attorneys' fees. The court of appeals agreed, and held that, when pleading and proving a RICO enterprise, that enterprise need not have an ascertainable structure separate and apart from the alleged pattern of racketeering—in this case the offering and activating of the trial internet access service.

That ruling is wrong in two important respects. First, the court of appeals' ruling conflated two requirements under RICO § 1962(c)—that there be an "enterprise" and that a person, employed by or associated with the enterprise, conduct the affairs of the enterprise through a pattern of "racketeering activity." By allowing the "enterprise" requirement to be satisfied by nothing more than the alleged "racketeering activity," the Ninth Circuit transformed RICO into a general civil conspiracy action

for treble damages based on the various RICO predicate crimes.

The courts of appeals are hopelessly divided on this issue. The majority of the courts require that RICO plaintiffs prove a meaningful enterprise, with a structure beyond that of the racketeering activity. This Court should grant review and rule likewise.

Second, even if a RICO association-in-fact enterprise could somehow be formed with no structure distinct or apart from the alleged racketeering activity itself, the RICO statute is unambiguous that an association-in-fact enterprise does not extend to a group of corporations with a business agreement, but rather is limited to a "union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). Congress used the term "individual" distinctly from the term "corporation" in RICO, and the use of "individuals" in the association-in-fact enterprise definition plainly does not include "corporations."

The court of appeals' ruling has a profoundly negative impact on American business because it unfairly penalizes corporations with the threat of private civil actions for treble damages based on everyday business agreements between corporations. This Court, the federal government, and the *amicus* United States Chamber of Commerce and its members have all repeatedly recognized that corporate collaborations are vital to this Nation's economy. Those collaborations will be severely jeopardized unless the ruling below is reviewed and reversed. Accordingly, this Court should grant *certiorari* and constrain RICO's enterprise definition to its statutory scope.

ARGUMENT

THIS COURT'S REVIEW IS NEEDED TO REVERSE THE RULING BELOW THAT ALLOWS A CORPORATION TO BE HELD LIABLE FOR TREBLE DAMAGES UNDER RICO FOR CONDUCTING THE AFFAIRS OF A PURPORTED "ENTERPRISE" THAT IS NOTHING MORE THAN A BUSINESS AGREEMENT BETWEEN TWO CORPORATIONS

A. The Court Of Appeals' Erroneous Reading Of RICO Stifles Legitimate Business Collaboration That Is Critical To Innovation And Entrepreneurship In The American Economy

The court of appeals' divided *en banc* decision deepens a rift amongst the federal courts of appeals. Contrary to the views of several other circuits, the ruling below eliminates the requirement that a RICO plaintiff plead and prove something more than a pattern of racketeering activity and it thus deters legitimate corporate collaborations by allowing them to be cast as RICO enterprises.

1. The error in the ruling below makes legitimate corporate collaborations susceptible to allegations of a RICO "enterprise"

The text and history of the RICO statute demonstrate the error in the court of appeals' ruling and make clear that Section 1962(c) requires more than mere proof of a pattern of racketeering activity. RICO provides for the unusual relief of treble damages and Congress limited that relief to certain instances, *e.g.*, under 18 U.S.C. § 1962(c) where there is a pattern of racketeering being used by an employee or associate of an "enterprise" to conduct the affairs of that enterprise (or to participate in the conduct of those affairs). Treble damages under RICO Section 1962(c) are not available in instances of mere racketeering or the many other crimes that may serve as RICO predicate offenses, ranging from fraud to murder. When

such crimes are at issue, but not as part of a pattern of racketeering that is corrupting the affairs of an enterprise, the standard criminal and civil remedies apply. It is only when a person engages in a "pattern of racketeering activity" to conduct the affairs of an "enterprise" (*i.e.*, the "organized crime" targeted by Congress) that the remedy and deterrent of treble damages is authorized. 18 U.S.C. § 1962(c).

But the ruling below wholly disregards these limits on the powerful treble-damages sword of RICO. The ruling conflated two distinct requirements under RICO Section 1962(c)—that there be an "enterprise" and that a person, employed by or associated with the enterprise, conduct the affairs of the enterprise through a pattern of "racketeering activity."

The ruling means that legitimate business collaborations face threats of RICO treble damages because, under the court of appeals' rationale, the collaboration itself can constitute a RICO enterprise and any allegation that the collaboration includes a pattern of underlying predicate offenses such as fraud can, at the same time, satisfy the requirement of racketeering activity. Thus, the ruling transforms RICO into a general civil conspiracy action for treble damages, based on any one of the many RICO predicate crimes, whenever a business collaboration is involved.

2. Legitimate business collaboration is vital to the nation's economy

Collaboration among businesses, which often consists of no more than a contract between two corporations, can create efficiencies, allow for penetration into new markets, and facilitate the sharing of complementary expertise. For example, many corporations rely on outside firms, such as accounting, investment, security, consulting, and employment companies, to provide services that allow the corporation to focus on its core competencies. *See Partners in Wealth: The Ins & Outs Of Collaboration*, The

Economist, January 21, 2006 (Survey: The Company: The New Organisation), at 16.

Both the Department of Justice and the Federal Trade Commission have expressly acknowledged that even competitors sometimes need to collaborate "[i]n order to compete in modern markets." FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 1 (2000). "Competitive forces" are driving corporate collaborations, whether by marketing agreements (at issue in the instant dispute) or more formal arrangements, so that business can "achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs." *Ibid.*[2]

Empirical evidence demonstrates that businesses view corporate alliances "as increasingly critical to their company's success." Trendsetter Barometer, *Alliances and Acquisitions Increasingly Important for Fast-Growth Companies, PricewaterhouseCoopers finds* (May 16, 2006), *available at* http://www.barometersurveys.com/production/barsurv.nsf/4d3e5784001f780185256b89007aa641/ab4251f9da6291568525716f006bfce0?OpenDocument&Highlight=2,alliance (last visited September 3, 2007). More than one-third of the 339 chief executive officers surveyed from some of the fastest growing U.S. businesses identified "licensing or co-marketing agreements" as "critical." One-quarter of those companies "were involved in an average of 5.7

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[2] *Cf. Reves v. Ernst & Young*, 507 U.S. 170 (1993) (arrangement between an accounting firm and a farmer's cooperative business). In *Reves*, the plaintiffs alleged that the business was the enterprise and the accounting firm was liable under RICO as having "conducted or participated in the conduct of the 'enterprise's affairs,'" *Reves*, 507 U.S. at 185 (emphasis omitted), a burden they could not meet. Under the ruling below, however, plaintiffs would need to allege only that the accounting firm and the farmer's cooperative, by nature of their contractual relationship, formed an enterprise together and then it could have sued both of them as participants in that enterprise, allegedly conducting the affairs of the enterprise through racketeering.

licensing or co-marketing agreements" between 2004 to 2006. *Ibid.*[3]

Indeed, this Court also has long recognized that corporate collaborations "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *see also United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 169 (1964) (noting that the "economic significance" of corporate collaborations "has grown tremendously").[4] Businesses often enter into such arrangements in order to create synergies to stay

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[3] Executives have explained the rationale for entering into corporate collaborations:

> We have gone from saying: "We have a series of products, and we are going to deliver them to whoever may choose to buy those products or services?" to a model of saying, "You are my customer, and what is it that I can do to try to own as much of your wallet and become more important to you." Then we try to do our best to come up with all those services that our client cares about. Some of the services I already provide. Some of the services I really do not have the resources to be able to provide right now. So, I am left with three options. For instance, I can choose not to ever provide those services. But if I want to fill the client's needs, I may choose to go out and buy a company that can help me be more important to the client. Or, and this is the third option, I can form some kind of an alliance with somebody. This option may end up being a joint venture.

Daniel F. Austin, *Comment: A Businessperson's Perspective Concerning Joint Ventures*, 53 Case W. Res. L. Rev. 905, 905-906 (2003).

[4] A corporate collaboration, such as the marketing agreement at issue in the instant dispute, "encompasses any collaborative undertaking by which two or more firms pool resources to pursue some objective, such as producing a common good, selling a common service, purchasing production inputs, and the like." Editors Note, *Symposium: Antitrust Scrutiny of Joint Ventures*, 66 Antitrust L.J. 641, 642 (1998). These arrangements can consist both of basic contractual relationships—such as the marketing agreement in the underlying dispute—or more formal integrations where the collaborating businesses create an entirely new economic or corporate entity. *Ibid.* The more formal arrangements are not at issue in the instant dispute.

competitive. *Texaco Inc. v. Dagher*, 126 S. Ct. 1276, 1279-1280 n.1 (2006); *see also* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1138, 1139 (2001) ("'Going it alone' is no longer an option for many American businesses. Intensified foreign competition, increased demands for new technologies, soaring capital and research and development costs, shortened product life cycles, and more stringent demands for quality and performance have all added to the risk of doing business. Many firms simply lack the capital, labor, or technology required to compete effectively in such an environment.").

3. The Ninth Circuit's ruling deters legitimate corporate collaboration

The Ninth Circuit's ruling in the instant case raises issues of great importance to the business community akin to those that were at stake in *Texaco Inc. v. Dagher*, 126 S. Ct. 1276 (2006), where the Court held that a *per se* rule against price fixing does not apply "to an important and increasingly popular form of business organization, the joint venture," *id.* at 1279. The ruling below chills similar legitimate and beneficial economic activity by raising the specter of RICO liability, as well as its attendant stigma, treble damages and attorneys' fees, for other efficiency enhancing collaborations.[5] The concerns raised by the instant dispute go even further than *Dagher* because the type of collaboration at issue here involved no more than a simple marketing contract between two corporations. Yet, the court of appeals held that the allegations met the RICO "enterprise" requirement of Section 1962(c), which could therefore encompass almost every conceivable economic relationship between two or more businesses.

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[5] The concerns expressed by the Court in *Dagher* are particularly relevant to the instant dispute because RICO was modeled after antitrust laws and their remedies. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 485 (1985).

These concerns are not illusory. Civil RICO is becoming one of the most frequent and damaging devices used against businesses. Since 2001, a staggering 4500 civil RICO cases have been filed, only 35 of which were brought by the government. *See Federal Judicial Caseload Statistics*, 2001-2006, Tables C-2 (U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit), *available at* http://www.uscourts.gov/caseload statistics.html (last visited Aug. 8, 2007). These numbers plainly demonstrate what is already obvious: RICO has strayed well beyond its original intent of fighting organized crime.

Indeed, many of the *amicus* Chamber of Commerce's members already face a constant threat of civil RICO suits. And the mere prospect of an increase of costly and potentially ruinous RICO treble-damages litigation predicated solely on collaborations like the marketing agreement at issue here will inappropriately affect corporate decisionmaking. Such an increased risk of RICO litigation means that the possibility of a RICO suit will be factored into the strategic planning of legitimate corporate collaborations, a result that the drafters of the act could not have envisioned.

Moreover, as this Court has recognized, "procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 (1978). Civil RICO carries precisely such a "stigmatizing effect," because it is brought under a statute that applies to federal criminal prosecution of racketeering, *Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990), and thus has been considered "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991); *see also Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J. dissenting) ("Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for

extortive purposes, giving rise to the very evils that it was designed to combat.") (citing Arthur R. Matthews, *et al.*, *Report of the Ad Hoc Civil RICO Task Force*, American Bar Ass'n Section of Corp. Banking & Bus. L. at 69 (1985)).

B. The Court Of Appeals' Ruling Is Contrary To RICO's Plain Language On Two Important Questions Concerning The Scope Of A RICO "Enterprise" And Deepens A Conflict With Other Circuits

As the name of the act suggests, the text of the law provides that a person violates RICO (the Racketeer Influenced and Corrupt Organizations Act) when the person criminally influences or corrupts an organization through one of the racketeering activities listed by Congress. *See* 18 U.S.C. § 1962(a) to (d). But civil RICO has expanded far outside its original intent to punish organized crime and to prevent its infiltration into our Nation's businesses. *See* Samuel Alito, Jr., *Racketeering Made Simple(r), in The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (noting that RICO has "two aims: * * * to make it unlawful for individuals to function as members of organized criminal groups [and] * * * to stop organized crime's infiltration of legitimate businesses."). This Court has expressed "doubts" about the evolution of civil RICO "into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500.

The ruling below further exacerbates this problem by resting on two fundamentally flawed interpretations of the statute. And the court reached this result despite the well-established, contrary interpretation of several other circuits on one of those questions regarding the distinct elements under Section 1962(c).

1. An allegation of a "pattern of racketeering activity" does not constitute an allegation of an "enterprise" for purposes of Section 1962(c)

The divided *en banc* Ninth Circuit erred when it ruled that a RICO "enterprise" need not possess any ascertainable structure that is separate and apart from the alleged pattern of "racketeering activity." This conclusion, in essence, imposes no limit on what constitutes an "enterprise" under the statute.

That was not the intent of Congress. As the concurring judges of the Ninth Circuit recognized, "RICO targets a more sophisticated crowd: those persons or entities associated in fact with 'ongoing organization'—some minimal structure, coordination, or ordering principle to distinguish them from a run-of-the-mill conspiracy." Pet. App. 25a. Several other courts of appeals have long held that view of the meaning of the statute. *See, e.g.*, *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir.), *cert. denied*, 519 U.S. 999 (1996) ("[t]here must be some structure, to distinguish an enterprise from a mere conspiracy" (brackets in original)) (quoting *United States v. Korando*, 29 F.3d 1114, 1117 (7th Cir.), *cert. denied*, 513 U.S. 993 (1994)); *see also United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982) (same).

The ruling of those courts follows directly from this Court's reasoning in *United States v. Turkette*:

> In order to secure a conviction under RICO, the Government must prove the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. 18 U.S.C. § 1961(1) (1976 ed., Supp. III). The former is proved by evidence of an ongoing

> organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

452 U.S. 576, 583 (1981). That reasoning clearly distinguished, as does the statute, between RICO's "enterprise" requirement and its "pattern of racketeering requirement," so that the mere existence of a group of individuals engaged in the latter does not, by itself, satisfy the former. The Court underscored that very point in no uncertain terms by explaining that "proof" of one of these elements "does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Ibid.*

The *Turkette* Court's construction of 18 U.S.C. § 1962(c), unlike the decision below, is rooted in the plain language of the statute. Section 1962(c), by its express terms, requires both an "enterprise engaged in, or the activities of which affect, interstate or foreign commerce" *and* "a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). If the enterprise requirement were satisfied merely by allegations of a defendant or defendants engaging in a pattern of racketeering activity, then the enterprise requirement would be entirely superfluous to the statutory scheme, contrary to ordinary assumption that Congress intended such statutory terms to have meaning. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

2. A group of corporations that are associated through a business agreement, but are not a separate legal entity, do not constitute a RICO "enterprise"

The second error in the court of appeals' statutory construction is rooted in the fact that plaintiff's RICO claim is premised on the allegation that two businesses created an association-in-fact enterprise by entering into a

marketing agreement. The plain language of RICO does not support such an allegation.

Section 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The first part of the definition that relates to legal-entity enterprises lists separately any "individual" and any "corporation." The second part of the definition that relates to association-in-fact enterprises lists only "groups of individuals" and not groups of corporations.

The reference to "individuals" in the second part of Section 1961(4)'s definition cannot be interpreted to include corporations in light of the express use of those two distinct terms earlier in the same sentence to mean separate things. Had Congress intended "individual" to include a "corporation" it would not have included both terms in the definition. *TRW*, 534 U.S. at 31. And, of course, the second use of the term "individual" in Section 1961(4) should be given the same construction as the first use because Congress does not ordinarily give the identical term two different meanings in the same statute, let alone in the very same sentence. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

That interpretation also is consistent with Congress's definition of "person" in RICO, which Congress defined to include "any *individual* or *entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). Congress specifically used "individual" in the ordinary sense of the word to mean "an individual human being" and not a corporation or other legal entity, *Clinton v. New York*, 524 U.S. 417, 428 n.13 (1998) (citing Webster's Third New International Dictionary 1152 (1986)). Had Congress meant "individual[s]" to encompass "entit[ies]" such as corporations, it would not have used both terms. *TRW*, 534 U.S. at 31.

Lower courts have not necessarily grappled with these statutory interpretation arguments because they, instead, have seized upon a portion of one statement by this Court in *Turkette*, and have used it to summarily declare that "[t]here is no restriction upon the associations embraced by the definition." *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) (quoting *Turkette*, 452 U.S. at 580); *see also United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993). But those courts, including the court below, ignored or disregarded the critical *next* phrase in the *Turkette* Court's opinion which echoes the statutory text: "an enterprise includes any union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580.

The ruling below thus is premised on a flawed interpretation of Section 1961(4) that includes as RICO enterprises groups of organizations that are not legal entities, contrary to the plain statutory text, and should be reversed.

C. The Instant Case Presents An Ideal Vehicle For This Court's Review Of The Proper Scope Of RICO

As addressed in the petition for a writ of *certiorari*, the divided *en banc* court of appeals deepened a mature split of authorities in the federal courts as to whether RICO requires a meaningful enterprise, *viz.*, one with an ascertainable structure separate and apart from that which would be inherent in the alleged pattern of racketeering activity. *See* Pet. 11-18. Seven courts of appeals have held that such a structure is required. *United States v. Riccobene*, 709 F.2d 214, 223-224 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983); *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987); *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir.), *cert. denied*, 127 S. Ct. 48 (2006); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); *United States v. Anderson*, 626 F.2d 1358, 1363

(8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991). Four other courts of appeals, including the court below, have held that a separate and distinct enterprise is not required. Pet. App. 17a-18a; *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir.), *cert. denied*, 535 U.S. 910 (2001); *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983); *United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir.), *cert. denied*, 464 U.S. 856 (1983). This division of authorities is plainly entrenched and irreconcilable and can be resolved only by this Court. That alone justifies this Court's plenary review.

This Court's review is also warranted on the second question presented concerning the interpretation of the "association-in-fact" enterprise definition in Section 1961(4). If a corporation cannot be a part of an association-in-fact enterprise, as the plain language of the act indicates, then a corporate collaboration that is not a separate legal entity cannot give rise to a RICO suit alleging that racketeering activity was used to conduct the purported enterprise's affairs. As the petition correctly notes, several members of this Court have expressed at least skepticism regarding the rulings of the numerous courts that have permitted such actions to go forward. Pet. 19-21 nn.6-7 (quoting Tr. Oral Arg., *Mohawk Indus., Inc. v. Williams*, 126 S. Ct. 2016 (2006) (No. 05-465), at 29 (Roberts, C.J.), 32 (Kennedy, J.), 42 (Alito, J.), 51 (Souter, J.)).

There would be no benefit in permitting this issue to percolate in the lower federal courts. The courts of appeals have already addressed the scope of 18 U.S.C. § 1961(4) on numerous occasions and have universally reached the wrong result. Although these rulings do not possess lengthy analyses, the courts of appeals have sufficiently vetted the issue by having justified their holdings for a litany of (erroneous) reasons.

For example, some courts have cited Congress's use of the term "includes" at the beginning of the "enterprise" definition ("'enterprise' includes * * * ") and have held that the list of entities that follows "is not meant to

be exhaustive," so that an informal group including corporations can constitute an association-in-fact enterprise. *See Perholtz*, 842 F.2d at 352-353; *see also United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 n.7 (8th Cir. 1989). But that construction of Section 1961(4) is inconsistent with similar uses of "includes" elsewhere in the RICO statute, where those definitions are understood to be exhaustive. *See, e.g.*, 18 U.S.C. § 1961(10) ("'Attorney General' includes the Attorney General of [the] United States * * * or any employee of the department [of Justice] or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter."). By contrast, where Congress intended in the RICO statute to be *illustrative* rather than exhaustive, it used the phrase "including, but not limited to * * * ." *See, e.g.*, 18 U.S.C. § 1964(a).

Some courts also have justified their departure from the plain language of Section 1961(4) based upon policy considerations—that if an association-in-fact enterprise did not include groups of corporations, then "only criminals who failed to form corporate shells to aid their illicit schemes could be reached by RICO." *United States v. London*, 66 F.3d 1227, 1244 (1st Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996) (quoting *Perholtz*, 842 F.2d at 343); *Masters*, 924 F.2d at 1366-1367. But that concern is unwarranted because holding that a RICO enterprise does not extend to a group of corporations that is not a legal entity does not immunize the corporations from suit under RICO. Once a RICO enterprise is identified (be it a legal entity or an association-in-fact entity), a RICO civil action for treble damages under Section 1962(c) can be brought against any corporation or other person who is employed by or associated with the enterprise and is conducting the affairs of the enterprise through a pattern of racketeering activity, so long as there is a separate enterprise. If there is no separate enterprise, any entity or individual engaged in racketeering is, of course, subject to other criminal prosecution and civil suit.

Some courts have construed "enterprise" in an overly broad manner by invoking the RICO clause that provides that RICO "'shall be liberally construed to effectuate its remedial purposes.'" *See, e.g.*, *Huber*, 603 F.2d at 394 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). This clause, however, "is not an invitation to apply RICO to new purposes that Congress never intended," *Reves*, 507 U.S. at 183, and that construction butts up against the rule of lenity, which requires that RICO, like any statute enforced both criminally and civilly, be strictly construed with ambiguities in favor of the accused. *See Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003).[6]

As such, even though lower courts have reached a universal conclusion on the second question presented, this Court's plenary review is justified on that question because the universal conclusion is wrong and there is no coherent or sustainable justification for a departure from the plain language of Section 1961(4).

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[6] The rule of lenity applies to statutes that have both criminal and civil applications. *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws.").

CONCLUSION

For the foregoing reasons and those set forth in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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